

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
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)	
Petition of Qwest Corporation for Forbearance)	WC Docket No. 04-416
Pursuant to 47 U.S.C. § 160(c) Pertaining to)	
Qwest's xDSL Services)	
)	
)	

**OPPOSITION OF THE
INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA**

The Information Technology Association of America ("ITAA") hereby opposes the Petition for Forbearance filed by Qwest Corporation ("Qwest").¹

INTRODUCTION

Qwest offers a number of digital subscriber line ("DSL") services, including a wholesale "bulk" DSL service designed to meet the needs of information service providers ("ISPs"). Qwest concedes that its DSL services are telecommunications services, which must be offered on a common carrier basis.² However, Qwest asks that the Commission forbear from applying to its DSL services the dominant carrier tariff regulation, rate integration, and mandatory resale requirements contained in Title II of the Communications Act and the Commission's Rules. Qwest contends that these regulations are no longer necessary to prevent discrimination and protect consumers because: (1) Qwest's DSL services are subject to "intermodal competition"

¹ Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) Pertaining to Qwest's xDSL Services, WC Docket No. 04-416 (filed Nov. 10, 2004) ("Qwest Petition").

² *Id.* at 4.

from cable, satellite, and wireless services; (2) the Commission has not imposed comparable regulation on cable system operators; and (3) Qwest lacks the incentive to discriminate against non-affiliated wholesale customers in the provision of DSL services. As demonstrated below, none of these assertions is correct. The Commission, therefore, should deny Qwest's petition.

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States – ranging from major multinational corporations to small, locally based enterprises. ITAA's members include a significant number of ISPs that have always been (and remain) critically dependent on telecommunications services provided by the incumbent local exchange carriers ("ILECs"). Therefore, during the last twenty-five years, ITAA (and its predecessor, ADAPSO) has participated actively in Commission proceedings governing the obligations of the Bell Operating Companies ("BOCs") and other ILECs to offer the basic telecommunications services necessary to provide information services on a just, reasonable, and non-discriminatory basis. Such participation includes all three of the *Computer Inquiries*, and the *Open Network Architecture, Competitive Carrier, Local Competition, Access Reform, Broadband Non-Dominance*, and *Broadband ISP proceedings*.

I. BECAUSE QWEST – LIKE ALL ILECs – RETAINS SIGNIFICANT MARKET POWER IN THE WHOLESALE BROADBAND TELECOMMUNICATIONS SERVICES MARKETS, DOMINANT LICENSEE REGULATION REMAINS NECESSARY

A. Qwest is Not Subject to Effective Competition in the Wholesale DSL Market

Qwest asserts that regulation is no longer necessary because it is subject to “intermodal competition” from cable, wireless, and satellite providers.³ There is no doubt that, at the present time, far more residential customers obtain *retail* broadband Internet access service from cable-based ISPs than from wireline-based ISPs. Qwest, however, has completely ignored the *wholesale* broadband market. ISPs that do not own their own facilities, but which seek to provide broadband information services to mass market customers, must obtain broadband transmission service. In most cases, ISPs have no viable alternative but to obtain this service from an ILEC.

Cable systems do not provide intermodal competition in the wholesale mass market broadband telecommunications service market.⁴ To the contrary, no cable system offers a generally available wholesale broadband transmission service that ISPs can use to serve their mass market retail customers.⁵ Indeed, the Commission has repeatedly rejected proposals to

³ *Id.* at 15-17.

⁴ ITAA discussed the lack of intermodal and intramodal competition in the market for wholesale mass market broadband telecommunications services in greater detail in the comments that it filed in the *ILEC Broadband Non-Dominance* proceeding. See Comments of the Information Technology Association of America, CC Docket No. 01-337 (filed Mar. 1, 2002). ITAA respectfully requests that those comments be incorporated in the record of this proceeding.

⁵ In any case, because cable systems generally serve only residential customers, ISPs cannot use cable to access business customers. Rather, in most cases, the only feasible means to provide broadband information services to these customers is over the public switched telephone network.

require cable operators to do so.⁶ Moreover, efforts by some localities to impose “open access” requirements have been found to be unlawful.⁷ As a result, in most cases, an ISP that is unable to obtain wholesale broadband telecommunications services from an ILEC at a reasonable price cannot obtain a substitute service from a cable system operator.

ISPs also generally cannot obtain wholesale broadband telecommunications service from other platform providers. Whatever their future potential may be, the Commission has recognized that, at present, wireless and satellite providers remain niche players in the broadband market – with a collective market share of less than one percent.⁸ And while the Commission has taken important action to facilitate the deployment of broadband over power line (“BPL”) services, there is no evidence that any customer currently is obtaining a commercial broadband service from a BPL provider.

Even if satellite, wireless, and BPL services grow significantly in the coming years, these providers – like cable operators – are not under a legal obligation to “open” their transmission

⁶ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002). At the present time, only one cable system (Time Warner) is under any legal obligation to cooperate with non-affiliated ISPs. Even Time Warner, however, is not subject to a general requirement to provide a wholesale broadband transmission service to any ISP. Rather, pursuant to a consent decree with the Federal Trade Commission, and consistent with the Commission’s order approving the necessary transfers of control in the AOL-Time Warner merger, Time Warner was required to enter into agreements with three nonaffiliated ISPs in which Time Warner and the ISP jointly provide a high-speed Internet access service to retail customers. See *Application for Consent of Transfer of Control of Licenses and Section 214 Authorization by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6568-69 (2000).

⁷ See, e.g., *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (Communications Act precludes franchise authority from conditioning a cable license transfer on provision of “open access”).

⁸ *Availability of Advanced Telecommunications Capacity in the United States*, Fourth Report to Congress, GN Docket No. 04-54, FCC 04-208 at 16 (rel. Sept. 9, 2004).

networks to non-affiliated ISPs. As a result, like cable operators, they may decline to provide wholesale transmission service to non-affiliated ISPs that seek to serve mass market customers – and, instead, offer retail mass market customers a bundled service consisting of transmission and information services.

Because Qwest is not subject to competition in the market for wholesale mass market telecommunications services, the Commission should not reduce or eliminate dominant carrier regulation of its wholesale DSL offerings.

B. Qwest Has the Ability and Incentive to Discriminate in the Provision of Wholesale DSL to Non-Affiliated ISPs

Qwest contends that, as competition in the retail broadband market continues to grow, it will have increased incentives to serve wholesale broadband customers. Therefore, Qwest claims, regulation is not necessary to ensure that it offers wholesale DSL “customers reasonable rates and terms.”⁹ The evidence, however, is to the contrary.

Qwest – like all major ILECs – currently participates in the “downstream” market for mass market broadband Internet access services. Because the ILECs’ DSL services are a significant input for mass market broadband Internet access services, and because the ILECs compete directly against non-affiliated ISPs in the mass market broadband Internet access services market, the ILECs have every incentive to refuse to provide wholesale broadband telecommunications services to non-affiliated ISPs – or to provide these services with unreasonable and discriminatory prices, terms, and conditions. By subjecting rival ISPs to a “price squeeze,” ILECs could drive non-affiliated ISPs out of the market. The increased revenues from sales of broadband Internet access service to retail customers would more than

⁹ Qwest Petition at 25.

offset the revenue loss from reduced sales of wholesale telecommunications services to non-affiliated ISPs.

The Commission has indisputable evidence that the ILECs have discriminated in the provision of wholesale telecommunications services to firms that compete against them in “downstream” markets. Just last month, the Commission concluded that another ILEC, BellSouth, had engaged in unlawful discrimination in the provision of special access service – an essential input for long distance service provided to enterprise customers – by offering greater discounts to BellSouth’s long distance affiliate than to BellSouth’s non-affiliated long distance competitors.¹⁰ Just as the ILECs have an incentive to discriminate against wholesale customers that compete against them in the long distance market, they have an incentive to discriminate against wholesale customers that compete against them in the information services market. Regulation of Qwest’s wholesale DSL service, therefore, remains necessary.

C. “Regulatory Symmetry” Does Not Require the Commission to Forbear From Regulating Qwest’s DSL Services

Finally, Qwest contends that its DSL services are improperly “burdened” by regulation that is more extensive than the regulations applicable to cable modem service.¹¹ Contrary to Qwest’s suggestion, the absence of “regulatory symmetry” between ILEC and cable regulation does not provide a basis for granting Qwest’s petition.

While the Telecommunications Act removed legal barriers to intermodal competition, it did not abolish the separate regulatory regimes applicable to ILECs and cable system operators.

¹⁰ See *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, FCC 04-278, EB-04-MD-010 (rel. Dec. 9, 2004).

¹¹ Qwest Petition at 11 (“Qwest’s DSL offerings are burdened with the full weight of Title II and common carrier regulation, as well as being subject to different tax and USF contribution levies from [sic] their cable modem competition. In comparison, cable modem providers and Qwest’s other mass-market broadband rivals enjoy relative freedom.”)

To the contrary, Congress imposed specific regulatory obligations on the ILECs, which are designed to protect consumers and promote competition.¹² These obligations are fully applicable to the ILECs' provision of DSL services.¹³ Congress' decision to impose special obligations on the ILECs reflects their unique role: The ILECs' local networks were constructed in order to transport information provided by others. They remain the only transmission platform that can provide access to virtually any business or residence in the country. The public interest requires that the ILECs keep this platform "open" on a non-discriminatory basis.

By contrast, cable systems were designed to provide one-way transmission of multi-channel video programming. Therefore, cable systems historically have not been required to provide transmission service to others. Rather, Congress has imposed different regulatory "burdens." For example, cable operators must often pay substantial franchise fees.¹⁴ In addition, cable system operators must devote capacity to so-called PEG (public interest, educational, and government) programming and to public access programs.¹⁵ These obligations, of course, are not applicable to ILECs. Because nothing in the Communications Act requires "symmetry" in the regulation applicable to ILECs and the cable system operators, the fact that the Commission has not extended common carrier-type obligations to cable-provided broadband transmission services does not provide a basis for ceasing to apply these obligations to ILEC-provided DSL services.

¹² See, e.g., 47 U.S.C. § 251(c).

¹³ See *WorldCom, Inc. v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001) ("DSL-based advanced services qualify as 'telecommunications services' . . .").

¹⁴ See 47 U.S.C. § 542(b) (setting cap on local franchise fees of five percent of gross revenues).

¹⁵ See *id.* §§ 531, 535.

II. THE COMMISSION SHOULD NOT FORBEAR FROM REQUIRING QWEST TO OFFER AVOIDED COST RESALE TO CLECs THAT SEEK TO PROVIDE A COMPETITIVE DSL SERVICE

Qwest specifically requests that the Commission forbear from applying to its DSL services the requirement, in Section 251(c) of the Communications Act, 47 U.S.C. § 251(c), that ILECs allow competitive local exchange carriers (“CLECs”) to purchase wholesale telecommunications services at avoided cost.¹⁶ The Commission should decline to do so.

As discussed above, an ISP that seeks to serve mass market customers, but does not have its own broadband transmission facilities, typically cannot obtain wholesale broadband telecommunications service from cable or wireless providers. The only viable alternative to the ILECs remains the CLECs – which, as common carriers, must provide service on just, reasonable, and non-discriminatory prices, terms, and conditions. The Commission, however, has already hampered the CLECs’ ability to provide competitive DSL services by eliminating line sharing.¹⁷ As a result, if the Commission is to foster competition in the wholesale DSL market – thereby providing ISPs with meaningful competitive alternatives – the Commission must preserve the ILECs’ obligation to allow CLECs to purchase wholesale DSL at avoided cost.

CONCLUSION

Qwest has failed to demonstrate that dominant carrier regulation of its DSL services is no longer necessary to prevent unreasonable discrimination and protect consumers. To the contrary, because Qwest – like all ILECs – is not subject to effective competition in the wholesale broadband telecommunications services markets, and retains the incentive to discriminate against

¹⁶ See Qwest Petition at 23-27.

¹⁷ See *Review of Section 251 Unbundling Obligations of Local Exchange Carriers*, Report and Order on Remand, 18 FCC Rcd 16978, 17103 (2003).

non-affiliated ISPs, these regulations remain essential. The Commission, therefore, should deny Qwest's forbearance petition.

Respectfully submitted,

**INFORMATION TECHNOLOGY
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